Supreme Court, U.S.
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No. 94-1165

In The

Supreme Court of the United States

October Term, 1994

STANISLAW R. BURZYNSKI, M.D., Ph. D.,

Petitioner,

vs.

TRUSTEES OF THE NORTHWEST LAUNDRY AND DRY CLEANERS HEALTH & WELFARE TRUST FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

1. The Fifth Circuit correctly affirmed the district court's grant of summary judgment for common law fraud without discussing the principles of comity, federalism, or abstention because those concerns were not properly raised in either the district or circuit courts.

2. The Fifth Circuit correctly affirmed the district court's grant of summary judgment for Respondent based upon the law and the evidence submitted to and decided by the district court.

3. The Fifth Circuit correctly affirmed the district court's grant of summary judgment on the ERISA claims in the Respondent's complaint.

4. Petitioner was not deprived of any due process rights.

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CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2728 (1983)	10

STATEMENT OF FACTS

Petitioner, Stanislaw R. Burzynski, is a Houston doctor who developed an unorthodox treatment for cancer called antineoplastons. As noted by both the district and circuit courts, this antineoplastons treatment has never been approved by either the federal Food and Drug Administration ("FDA") or the Texas Department of Health. Dr. Burzynski's unorthodox treatment has been subject of frequent litigation.

In 1984, Judge Gabrielle K. McDonald of the United States District Court for the Southern District of Texas entered an order prohibiting Burzynski from distributing his antineoplastons in interstate commerce. Similarly, section 431.114 of the Texas Health and Safety Code[1] bars the use of any non-FDA-approved drug in Texas. Thus, Burzynski was not allowed to distribute these drugs either interstate or intrastate.

Huey Roberts, a resident of Oregon, developed cancer of the esophagus in 1986. Radiation and chemotherapy treatments did not arrest his cancer. In 1988, Burzynski began administering antineoplastons treatments to Mr. Roberts. After an initial series of treatments in Burzynski's Houston office, Mr. Roberts continued taking these antineoplastons at his home in Oregon from a supply furnished by Burzynski. The treatments were ineffective and Mr. Roberts discontinued them on July 4, 1989. He later died.

Mr. Roberts was a beneficiary under the health plan of Respondent, Northwest Laundry and Dry Cleaners Health & Welfare Trust Fund ("the Fund"). Burzynski filed claims for and received over $90,000.00 from the Fund for the unorthodox antineoplastons treatments.

The antineoplastons treatments administered to Mr. Roberts

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1. TEX. HEALTH & SAFETY CODE ANN. § 431.114 (Vernon 1992).

in Texas violated Texas law. The treatments administered to Mr. Roberts in Oregon violated both federal law and Judge McDonald's permanent federal injunction. When the Fund learned that it had paid for illegal treatments, it sued, charging Burzynski with fraud and with ERISA and RICO violations.

On cross-motions for summary judgment, the district court entered summary judgment on October 15, 1992, for Burzynski on the RICO claims and for the Fund on its fraud and ERISA claims (Pet. App. D). Petitioner's Motion to Reargue was denied two months later, on December 11, 1992 (Pet. App. C). The Fifth Circuit panel unanimously affirmed the district court's ruling on July 28, 1994 (Pet. App. B). Petitioner's request for rehearing and for rehearing en banc was denied on October 4, 1994 (Pet. App. A).

Meanwhile, in an entirely unrelated proceeding to which the Fund was neither a party nor a participant, the Texas State Board of Medical Examiners apparently[2] sought disciplinary action against Burzynski for his continued use of illegal drug treatments (Pet. App. E). On March 10, 1994, a year and a half after the

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2. Since the Fund was not a participant in this state proceeding and since none of the documents contained in the Appendix to the Petition for Certiorari relating to this administrative action existed, much less being authenticated or introduced evidence, at the time of the summary judgment hearing, the Fund cannot and does not vouch for their accuracy, authenticity, or relevancy. They ought not be considered by this Court. *See Larry v. White*, 929 F.2d 206, 210 (5th Cir. 1991), *reh'g denied*, 979 F.2d 1536, *cert. denied*, __ U.S. __, 113 S. Ct. 1946 (1993) (statistician's letter which was not presented to district court in affidavit or other verified form not considered by trial or appellate courts in summary judgment action); *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1983) (transcript of hearing which was not transcribed or made part of the record until after district court hearing on summary judgment was not to be considered by appellate court in review of summary judgment action).

district court's grant of summary judgment in this case and after oral argument of this appeal in the Fifth Circuit, a Texas administrative judge apparently held that the State Board failed to prove its allegations against Burzynski. This finding was reversed by the Texas State Board of Medical Examiners on September 6, 1994 (Pet. App. F). The Medical Board concluded that Burzynski's treatment of patients with antineoplastons constituted a violation of both the Texas Food, Drug and Cosmetics Act and the Texas Medical Practice Act (Pet. App. F, 16-17). The Medical Board ruling was made after the Fifth Circuit had rendered its opinion in the present case but made no reference to this case or the Fifth Circuit. On November 10, 1994, after the Fifth Circuit had denied Petitioner's request for rehearing, an Austin state district judge apparently granted a temporary injunction against enforcement of the State Board of Medical Examiners' Order (Pet. App. G). This ruling made no reference to the present case or the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION IS ENTIRELY UNRELATED TO ANY PENDING STATE MEDICAL BOARD PROCEEDING AGAINST THE PETITIONER.

Petitioner complains that his due process rights were violated by the Fifth Circuit's affirmance of the summary judgment rendered against him for defrauding the Fund during the pendency of a state court proceeding against him by the Texas State Board of Medical Examiners. The state complaint was filed long after the federal district court had granted summary judgment in the present case and has nothing to do with the Fund or Mr. Huey Roberts. The only commonality between the state and federal proceedings is that in both cases Burzynski was found to have distributed illegal drugs.

Apparently, it is the Petitioner's contention that a final judgment in a federal court is not worthy of any respect if the losing party is later subject to an unrelated state proceeding involving an issue that had been the subject of the earlier litigation. Petitioner cites no authority from any court, federal or state, to support this peculiar proposition. It is not the law. Nor does Petitioner explain why a federal appellate court should abstain from reviewing a summary judgment action because an unrelated proceeding is pending in a state court. Petitioner filed the present appeal, but is now claiming that the federal circuit court committed grievous error in deciding it. His position is akin to claiming that a federal circuit court should abstain from reviewing a federal bank robbery conviction because the defendant's state trial for robbing a different bank two weeks later is still pending.

The federal abstention doctrine does not go so far.

First, Petitioner never raised any abstention argument until after this case had been briefed and argued in the Fifth Circuit. The events upon which Petitioner relies for his abstention argument did not occur until after this case had been fully submitted to the circuit court. Current law does not permit a party who has lost his case in the trial court, and whose appeal is merely awaiting a final opinion, to cry "stop the world, I want to get off" because he has also been pursued by another party in a different forum for similar misconduct. The fact that the Texas State Board of Medical Examiners sought to discipline Burzynski for violations of the Texas Medical Practices Act that included, but were not limited to, dispensing illegal drugs, is not dispositive of the earlier summary judgment action. Further, it is somewhat disingenuous to argue that a federal court's ruling that Burzynski's antineoplastons treatment was illegal under Texas law must be delayed until he has completed his appeal of that same conclusion in a later Texas court proceeding. This is not an

instance of inconsistent or contradictory rulings. Both the state and federal systems have found that Burzynski's sale of unorthodox cancer drugs without FDA approval violates Texas law.

Second, while there are a few areas in which federal abstention is permissible, that doctrine remains "the exception, not the rule." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984). Generally, the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). Indeed, Petitioner admits that none of the three varieties of the federal abstention doctrine outlined in *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), really apply to his case. He is correct. They do not.

The *Burford* doctrine holds that when timely and adequate state court review is available, a federal court sitting in equity should not interfere with a state administrative agency proceeding when: (1) there are "difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case then at bar"; or (2) the "exercise of federal review of the question in a case and similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). The *Burford* doctrine does not apply here because: (1) there was no pending state administrative agency proceeding at the time summary judgment was granted; (2) there is no "difficult" question of state law involved: the Texas statute is plain, simple, and clear — no new drug may be dispensed in Texas without FDA approval;[3] (3) this case does not involve any

3. TEX. HEALTH & SAFETY CODE ANN. § 431.114 (Vernon 1992).

"policy problem" or crucial public issue of great import that transcends Burzynski's own antineoplastons treatment; Burzynski can easily avoid his current problems by ceasing antineoplastons treatments until he has obtained FDA approval; and (4) neither the present summary judgment nor the decision by the Texas State Board of Medical Examiners established a policy of substantial public concern; the pertinent public policy was established by the legislative statute banning non-FDA approved drugs. This case involves a person who simply refuses to abide by that public policy pronouncement.

The *Pullman* abstention doctrine does not apply for similar reasons. *See Railroad Comm'n of Texas v. Pullman,* 312 U.S. at 500 (abstention appropriate when federal court's injunction against enforcement of state orders would rest upon unraveling complex state law which had not yet been interpreted by state's highest court). Here, unlike the situation in *Pullman,* neither the federal district or circuit court's decision will have any effect upon the later state administrative proceeding.

Similarly, the *Younger* abstention doctrine has no application. That doctrine addresses the authority of federal courts to enjoin state criminal prosecutions which are based upon a statute challenged as unconstitutional under the First Amendment. 401 U.S. at 44. That scenario is the reverse of the present one. Burzynski is attempting to enjoin a federal appellate court from deciding the appeal that he filed because he was later subjected to disciplinary proceedings in state court. Petitioner invokes the principle of comity to support his claim, but comity normally requires that federal courts not interfere with state court proceedings. *Id.* There is no evidence in the present record to suggest that the Texas State Board of Medical Examiners proceedings against Petitioner will be affected in the slightest by any decision in the present common law fraud case. There is nothing to suggest that the Texas State Board of Medical

Examiners or the Texas courts are even aware of this litigation. Certainly those courts and those parties are not bound by any decision in this case.

In sum, Petitioner does not raise any legitimate issue concerning the federal abstention doctrine, nor does he raise any legitimate due process concern. The present case is not worthy of this Court's time and attention.

II.

THERE ARE NO "ANOMALIES" IN THE FIFTH CIRCUIT'S DECISION WHICH JUSTIFY SUPREME COURT REVIEW.

Petitioner claims that the Fifth Circuit should not have affirmed the present summary judgment on the Fund's claim of fraud on the basis that Petitioner knew or should have known that his treatment was illegal in Texas and he had a duty to disclose the truth. Petitioner claims that this issue was never presented to or decided by the district court. He is wrong.

First, the grant of a summary judgment may be affirmed on grounds other than those stated by the trial court. *Bernhardt By Bernhardt v. Richardson-Merrell, Inc.*, 892 F.2d 440, 444 (5th Cir. 1990). The issue on appeal is whether the grant of a summary judgment motion was correct, not whether the trial judge is eloquent or precise in the explanation for his ruling.

Second, both the trial and circuit courts correctly concluded that Stanislaw R. Burzynski defrauded the Fund because he materially misrepresented the legality of antineoplastons treatment (Pet. App. B, 8 & D, 8-9). While each court used slightly different language in reaching this conclusion, they both found that Petitioner breached his legal duty to disclose to the Fund the illegality of his treatments (Pet. App. B, 8 & D, 8-9).

While the Fifth Circuit relied upon three separate and distinctly articulated reasons why Burzynski had a duty to disclose,[4] and the district court's reasoning was more conclusory on this specific point,[5] both courts addressed and rejected the same contention.

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4. Those were: (1) Burzynski had a confidential relationship with the Fund; (2) Burzynski's partial disclosures to the Fund imposed a duty to make such additional disclosures as would remove the false and misleading character of his partial disclosures; and (3) Burzynski's status as a licensed doctor, subject to certain standards of ethical conduct, did not allow him the freedom to defraud a health insurer by obtaining reimbursement for illegally administered treatment (Pet. App. B, 13-16).

5. The district court reasoned that:

> Plaintiffs have established that Defendant, both in the manner that he presented his claim forms to Plaintiffs on behalf of the insured and in his correspondence with Plaintiffs, failed to disclose the questionable legitimacy of his treatment. Defendant never disclosed to Plaintiffs that his drug treatment was not approved by the FDA nor that his treatment was anything other than standard "chemotherapy."
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> * * *
>
> There is also sufficient evidence, based on the misleading way in which Defendant filed the claim forms, that he intended to induce Plaintiffs into paying for the treatment without further inquiry into the legitimacy of the treatment. The payment of approximately $97,000.00 to Defendant on behalf of the insured evidences Plaintiffs' reliance and resulting injury.

(Pet. App. D, 7, 9).

(Cont'd)

Petitioner also complains that the Fifth Circuit improperly upheld the district court's grant of summary judgment on the ERISA claim by basing its conclusion upon the Plan's language excluding payment for treatments which are not "medically necessary" and holding that illegal treatments are not "medically necessary." (Pet. App. B, 5-8). Petitioner contends that this specific issue was not part of the pleadings or of the district court's ruling. Once again, he is wrong. The Fund's ERISA pleading asserted that:

> The payments which the trust made to Defendant Burzynski were ineligible expenses not entitled to payment because the Trust had no legal obligation to pay for the expense incurred for which Mr. Roberts was not legally liable. Mr. Roberts was not legally liable to pay Defendant Burzynski's medical bills for antineoplastons therapy since the bills were for a treatment which was illegal in the state of Texas. Whatever contractual obligation Mr. Roberts may have had to pay Defendant Burzynski for the antineoplastons therapy was illegal and void.

(Pet. App. H, 15). The Fund's ERISA claim also incorporated all of the paragraphs dealing with the fraud claim (Pet. App. H, 14). The district court granted summary judgment on the ERISA claim based upon the same factual and legal reasoning as that underpinning the fraud claim (Pet. App. D, 9). Petitioner can

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(Cont'd)

When Burzynski filed a motion for reconsideration to the district judge, claiming, inter alia, that the Fund had failed to prove Burzynski owed any duty to be truthful to the Plaintiff, the court rejected this assertion, as well as the others, as "ludicrous." (Pet. App. C, 1-2).

hardly claim surprise or unfair prejudice by summary judgment on the ERISA claim upon a finding that the Plan excluded payment for illegal medical treatments. Petitioner does not claim that, as a matter of law, illegal treatments may nonetheless be medically necessary ones, nor does he cite any precedent for such a contention. He merely claims, incorrectly, that the Fifth Circuit "invented" a legal construct to explain its basis for affirming summary judgment on the ERISA claim.

Finally, Petitioner chides the Fifth Circuit for its purported consideration of arguments not raised in the district court. In the same breath, he asks this Court to review the circuit court's purported rejection of a decision (later overruled) by a Texas administrative law judge which was made more than a year after the district court's grant of summary judgment. He cannot have it both ways. Petitioner fails to explain why the general rule that trial and appellate courts look only to the evidence available to the trial court at the time of its ruling on a summary judgment motion should be jettisoned in his particular case. *See* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2728 (1983).

In sum, the Fifth Circuit's ruling and reasoning did not depart from the accepted and usual course of judicial proceedings. Judge Wisdom's opinion is well-articulated, clearly reasoned, and legally correct. The unanimous Fifth Circuit decision raises no novel or crucial legal issues that merit review by this Court.

CONCLUSION

For all of the foregoing reasons, this Court should not waste its time upon what the Fifth Circuit has declared "a medical iconoclast's long history of litigation over an unorthodox cancer treatment." Both the district and circuit courts properly concluded that Stanislaw R. Burzynski "may not trick [the Fund] into paying for an unlawful, unapproved drug." This is a simple fraud case. It is not a case involving complex or novel legal issues which, as a matter of public policy or widespread public concern, require this Court's attention. Respondent therefore respectfully requests that the present Petition for Certiorari be denied.

Respectfully submitted,

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